SUPREME COURT, U.S.
APR 15 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1548

DONNER WINSLOW,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

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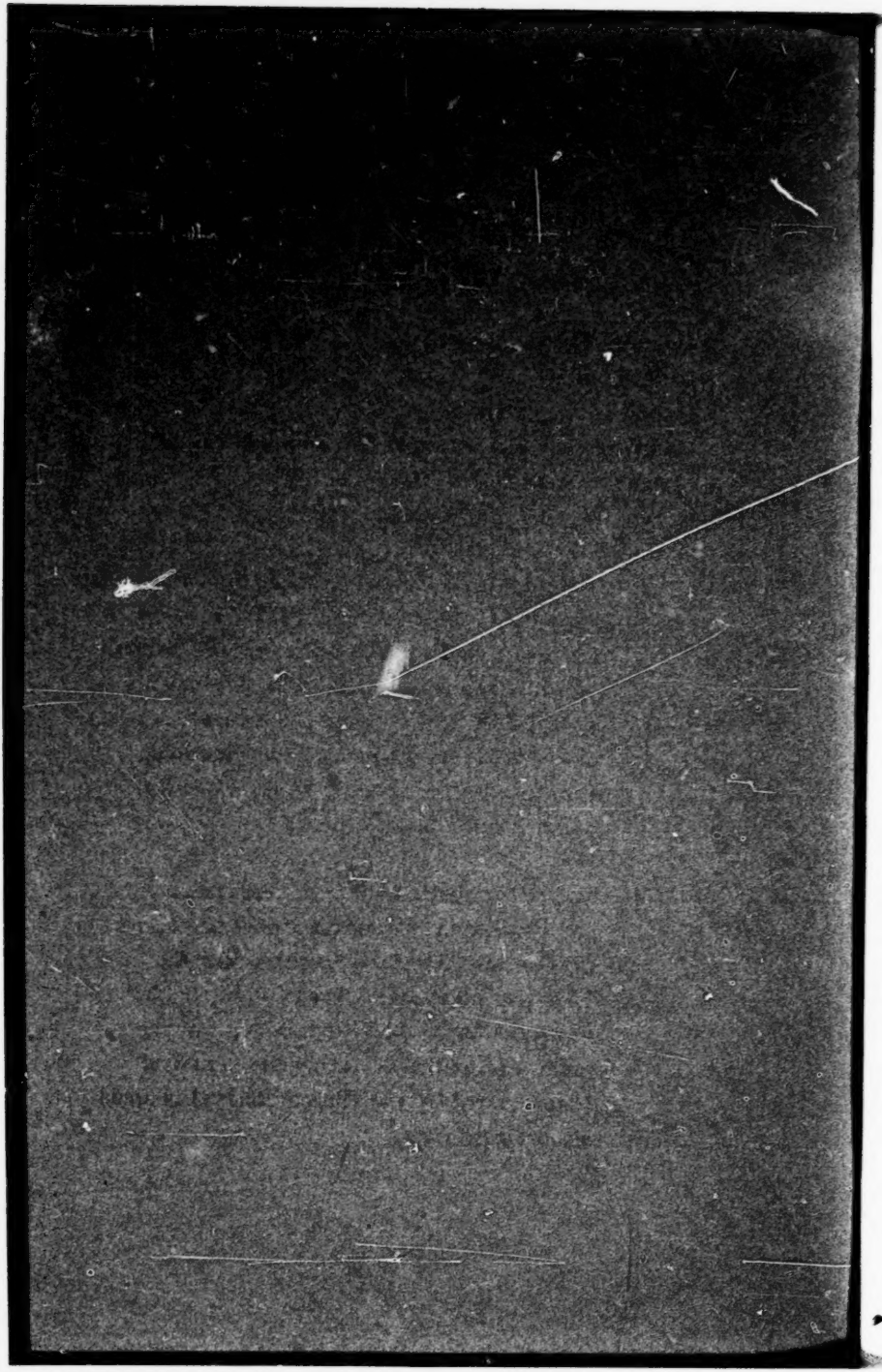

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COMMONWEALTH OF VIRGINIA,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Donner Winslow, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia, entered in this case on January 14, 1974.

OPINIONS BELOW

Donner Winslow was charged upon an Indictment issued by a Grand Jury and was tried on March 10-13, 1972 by his Honor, Judge A. W. Whitehurst, sitting with a jury in the Corporation Court of the City of Norfolk, Virginia, and on March 13, 1972, was convicted and found guilty of Distributing Obscene Items and was sentenced to six months confinement together with a fine of $1,000.00.

At the conclusion of the trial, the Defendant, through his attorneys, moved the Court to set aside the verdict as being contrary to the law and the evidence or in the alternative, for a new trial. Said motions were overruled.

Notice of Appeal to the Supreme Court of Virginia and Assignment of Errors were timely filed.

The Trial Court issued no written opinion. On October 17, 1972, the Supreme Court of Virginia affirmed the judgment of the Corporation Court with an order rejecting and refusing the petition for a writ of error and supersedeas filed on Mr. Winslow's behalf. That order was entered on October 17, 1972 and it is attached hereto as Appendix "A".

The United States Supreme Court on June 25, 1973 entered an Order vacating and remanding the Judgment in *Winslow* v. *Virginia*, # 72-994. Upon remand to the Supreme Court of Virginia, a Supplemental Brief was allowed to be filed and on January 14, 1974, the Supreme Court of Virginia reaffirmed its earlier Judgment. The Order of the Supreme Court of Virginia was entered on January 14, 1974, and is attached hereto as Appendix B.

JURISDICTION

The decision of the Supreme Court of Virginia was rendered January 14, 1974. This petition follows within 90 days thereof, Jurisdiction is invoked pursuant to 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

1. Is the Commonwealth of Virginia obscenity Code § 18.0-228 void for vagueness and overbreadth in violation of Petitioner's rights under the *First* and *Fourteenth Amendments* to the *Constitution of the United States* by virtue of the decision of this Court on June 21, 1973 in *Miller v. California, et al.?*

2. Are the publications involved herein obscene in the constitutional sense and thus not protected expression under the *First* and *Fourteenth Amendments* to the *Constitution of the United States,* as the same was applicable during the period of time covered by the conduct charged against Petitioner?

3. Can the various United States Supreme Court rulings on obscenity promulgated on June 21, 1973 and June 25, 1973 effecting a substantial decisional change in the application of constitutional principles be applied retroactively to Petitioner in the case at Bar for conduct occurring prior to these decisions and, is the application of such a statute to said Petitioner void as *ex post facto* legislation by virtue of *Article I, Sections Nine and Ten* of the *United States Constitution* and the Due Process laws of the *Fifth* and *Fourteenth Amendments?*

4. Does utilization of a purely local contemporary community standard versus a statewide contemporary community standard violate Petitioner's rights under the *First* and *Fourteenth Amendments* to the *Constitution of the United States?*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fifth and Fourteenth Amendments to the Constitution of the United States and the provisions of Section 18.1 – 188 of the Code of Virginia of 1950 are set forth in Appendix "C".

STATEMENT OF THE CASE

On December 22, 1971, Officer Robert E. Vest, Norfolk, Virginia Police Department, while acting on orders of his superiors, entered the Adult Book Store at 159 Dranby Street, Norfolk, Virginia, in order to purchase a book and film from that store. Donner Winslow was the clerk on duty at the time. Officer Vest purchased a motion picture film not identified by name or designation at the trial, and a magazine entitled "Cinema Sex."

The selections were made randomly without resort to any criteria. The magazine was sealed when it was purchased.

The film inside the box purchased by Officer Vest was not seen by him and another officer in the chain of custody could not state the film shown to the Jury was the same film purchased on December 22, 1971.

On January 3, 1972, Winslow was indicted by a Grand Jury, the indictment charging, in general terms, the sale of "obscene items." The Indictment failed to allege guilty knowledge of the content and character of the materials, i.e., "scienter". At the trial, the Commonwealth failed to prove "scienter" in that the Commonwealth's witnesses testified that the Defendant did not indicate such "scienter" and affirmatively showed a lack of "scienter".

During the course of the trial, the Court permitted the Commonwealth's experts to testify over the objection that they were not properly qualified. Mr. S. T. Barfield was permitted to testify while clearly showing he was not an unbiased expert witness, but sought to control obscenity without a particular qualifying or scientific training. He admitted he had not been to any library to know what explicit sexual material was available and had not seen motion pictures in the area so as to compare the challenged material.

Mr. Barfield admitted the items had social value even though he had not read the entire book as a whole. He condemned the entire book solely because of the pictures therein and at the same time, espoused that the rights of private viewing upheld by the United States Supreme Court in *Stanley v. Georgia*, 394 U.S. 557 (1969) was objectionable to him. The expertise of the witness was limited to the city of Norfolk.

Father H. H. Smith, an Episcopalian Priest, had seen no X-rated adult movies in the previous two years to determine the community standards of acceptance and did not know the human sexuality books available or accepted in the public

libraries. Petitioner was not allowed to question him on his opinion of compparable materials such as those found not to be obscene by the Supreme Court of the United States.

Although the Commonwealth's experts were allowed to testify fully, qualified persons were not allowed to testify for Petitioner in regard to contemporary community standards. A Professor of English at Old Dominion University and an Associate Professor at the University of Maryland School of Medicine were both not permitted to testify about contemporary community standards.

At the conclusion of the evidence, the Jury found Petitioner guilty.

HOW FEDERAL QUESTIONS ARE RAISED

Petitioner raised the questions presented herein as to the constitutionality of the statute and the sufficiency of the indictment in a motion to Dismiss and/or Quash, which was overruled. At the conclusion of the trial, Petitioner, through his attorneys, moved the Court to set aside the verdict as being contrary to the law and the evidence or in the alternative for a new trial. Those motions were overruled. A Notice of Appeal and Assignment of Errors was timely filed. All of the contentions made in this Petition were then presented to the Supreme Court of Virginia to no avail.

After the Supreme Court of the United States vacated and remanded back for consideration, the Supreme Court of Virginia reaffirmed and the arguments made herein were made by Supplemental Brief to that Court. This Petition follows within the time allowed by law.

REASONS FOR GRANTING THE WRIT

I.

THE IMPACT OF THE DECISIONS OF THE UNITED STATES SUPREME COURT ON JUNE 21, 1973 VIS-A-VIS LEGISLATIVE ENACTMENTS OF THE STATE OF VIRGINIA ON OBSCENITY IS THAT THE CODE OF VIRGINIA § 18.0-228 IS VOID FOR VAGUENESS AND OVERBREADTH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Section 18.1-228 Code of Virginia of 1950, *as amended reads as follows:*

"Production, Publication, Sale, Possession, etc. of obscene items. Every person who knowingly:

1. Prepares any obscene items for the purposes of sale or commercial distribution;

2. Prints, copies, manufactures, produces or reproduces any obscene item for purposes of sale or commercial distribution;

3. Publishes, sells, rents, lends, transports in intra-state commerce or commercially distributes or exhibits any obscene item or offers to do any of these things;

4. Has in his possession with intent to sell, rent, lend, transport or commercially distribute any obscene item, shall be guilty of a misdemeanor [1960, c. 233.]"

On June 21, 1973, the United States Supreme Court announced its holdings in five (5) cases submitted after argument which has forever changed the operative obscenity law.

The cases to which we make reference are as follows:

A. *Miller v. State of California*, No. 70-73, 413 U.S. 15,

B. *Paris Adult Theatre I, et al v. Slaton*, No. 71-1051, 413, U.S. 49,

C. *U.S.A. v. Orito, No. 70-69, 413 U.S. 139,*

D. *Kaplan v. State of California*, No. 71-1422, 413 U.S. 115,

E. *U.S.A. v. 12-200 Ft. Reels of Super 8mm Film, et al.*, No. 70-2, 413 U.S. 123.

Predicated on the foregoing decisions, this Court on June 25, 1973, by summary action and/or *per curiam* decisions vacated sixty (60) other obscenity cases on its docket in which no prior action had been taken. For a summary review of the cases to which we make reference herein, please note, 413 U.S. 902 et. seq.

This Court when it returned in October of 1973 for its new term continued the practice it started on June 25, 1973 of vacating and remanding back to the lower courts cases for obscenity law violations both Federal and State, Civil and Criminal. All of the vacated cases, without exception, proceeded under the *Roth-Memoirs* formulation and included one, *Cote v. U.S.A.*, No. 71-1120, 413 U.S. 915, wherein the defendant plead guilty and thereafter challenged the constitutionality of the statute on appeal.

On October 23, 1973 this Court vacated and remanded back to the Tenth Circuit the judgment in the case of *Harding v. U.S.*, Doc. No. 72-1646, 42 L.W. 3241. In the *Harding* case the Defendant conceded the obscenity of the material and challenged only the constitutionality of the law. All cases were, as previously stated, vacated and remanded for disposition by the lower courts.

After the decision of this Court in *Paris Adult Theatre I, et al v. Slaton*, counsel filed on July 16, 1973 a *Petition for*

Rehearing which petition was denied by this Court on October 9, 1973. (See 42 L.W. 3200). Among the grounds set forth by Counsel to ask this Court to reconsider or clarify its ruling in *Paris Adult Theatre I, et al* was as follows: "The vacation of the Judgment in this case and the Remand to the Georgia Supreme Court for 'further proceedings' leaves unconstitutionally vague what the duty is that is imposed upon the appellate court with regard to 'further proceedings'."

The effect of the court's decisions on the obscenity cases June 21 and 25, 1973 have caused substantial conflicts in both Federal and State jurisdictions as to what in fact this court has done in regard to pre-*Miller* conduct. Approximately eighteen (18) statutes have been ruled upon by appellate courts and Federal obscenity statutes as well as a state statute have been considered by eight (8) circuit courts of appeal and almost without exception each opinion is a shade different than the other and in some instances are diametrically opposed to one another. The Louisiana Supreme Court in the case of *Gulf States Theatres of Louisiana, et al, v. Richardson, et al* on remand concluded that what the U.S. Supreme Court had done is say that the *Roth-Memoirs* standards employed in the cases before it were unconstitutionally vague and for this reason set down a new constitutional standard. Thus the Supreme Court of the State of Louisiana held its obscenity law unconstitutional and went on to state that it was not the task of the judiciary to authoritatively construe or rewrite legislation and that it was the function of the Legislature.

The State of Indiana on remand of cases of *Mohney v. State* and *Stroud v. State* in the U.S. Supreme Court held that the effect of the U.S. Supreme Court's decision was to say that the *Roth-Memoirs* formulation for determining obscenity was unconstitutionally vague and they thus held that their state statutes were unconstitutionally vague. (See *Mohney v. State*, 300 N.E.2d 66 and *Stroud v. State*, 300 N.E.2d 100.)

The following represents a list of cases wherein appellate courts and/or *nisi pris* courts of record have ruled or reviewed cases involving pre-*Miller* conduct but in post-*Miller* decisions.

A. STATE APPELLATE COURTS OR FEDERAL THREE JUDGE COURTS INVOLVING STATE OBSCENITY LAWS

ALABAMA

United Artists Corporation vs.
E.L. Wrights, Jr., Inc., etc.
368 F. Supp. 1034

U.S.D.C. – M.D. of Alabama
Northern Division
(1-5-74)

Chester McKinney vs. City of Birmingham

#509 – #516
Alabama Court of Appeals
(10-30-73)

Harlow vs. City of Birmingham

#577, #582, #585
Alabama Court of Criminal Appeals
(1-15-74)

CALIFORNIA

People of the State of California vs. Enskat, 109 Cal Rptr 433

California Court of Appeals
2nd Appellate Dist.
Div. 5

DISTRICT OF COLUMBIA

Kaplan vs. U.S., No. 5452
District of Columbia Court of Appeals
(11-21-73)

FLORIDA

Rhodes vs. State, 283 So. 2d 351 (1973)

Supreme Court of Florida

Papp vs. State, 281 So 2d 600 (1973)

GEORGIA

Slaton, et al vs. Paris Adult Theatre
201 S.E. 2d 456

Supreme Court of Georgia
(10-30-73)

Jenkins vs. The State No. 27692,
199 S.E.2d 183 (7-2-73)
Cert. granted 12-10-73 #73-557)

INDIANA

Mohney vs. State, 300 N.E.2d 61 (1973)
Stroud vs. State, 300 N.E.2d 100 (1973)

IOWA

State vs. Edward J. Wedelstedt,
David Cory & Wa[illegible]e Davis
213 N.W.2d 652 (1973)

Supreme Court of Iowa
(12-19-73)

LOUISIANA

State vs. Shreveport News Agency, Inc.
287 So.2d 464 (1974)

Supreme Court of La.
(12-3-73)

State vs. Richard Lee McNutt
No. 52,489

Supreme Court of La.
(12-3-73)

Gulf States Theatres of La., et al
vs. John Richardson and
George W. D'Artois

No. 54,044
Supreme Court of La.
(12-3-73)

MASSACHUSETTS

Commonwealth v. Claflin,
298 N.E. 2d 888

Appeals Court of Mass.
Decided July 11, 1973

MISSOURI

City of Kansas City vs. O'Connor #57266
City of Kansas City vs. McNellis#58132
City of Kansas City vs. Reed #58133

Supreme Court of Missouri
(10 8-73)

State, ex rel. Wampler vs.
Dick and Edna Bird, etc.

No. 57240
Supreme Court of Missouri
(10-8-73)

NEW JERSEY

Hamar Theatres vs. Cryan, et al
365 F. Supp. 1312
U.S.D.C.–District of New Jersey

U.S.D.C. - District of New Juersey
(7-26-73)
Petition for Cert. pending #73-711

NEW YORK

People of the State of New York
vs. Jim Bucklay and Al Goldstein

No. 297
State of New York Court of Appeals
Decided: December 28, 1973

People of the State of New York
vs. Saul Heller

No. 184
State of New York Court of Appeals
Decided: December 28, 1973

Redlich v. Capri Cinema
347 N.Y. Supp. 2d, 811

NORTH DAKOTA

Jerry McCright, et al vs.
Allen I. Olson, et al

Civil Action #4849
U.S.D.C.
District of North Dakota,
Southeastern Div.
(12-17-73)

OHIO

State, ex rel Keating vs. Vixen,
35 Ohio St.2d 215 (1973)

State, ex rel. Sensenbrenner vs. Adult Book Store,
301 N.E.2d 695 (1973)

SOUTH CAROLINA

State vs. Watkins

Supreme Court of South Carolina
No. 19727
(11-26-73)

WISCONSIN

State of Wisconsin, ex rel. Joseph Chobot vs. Circuit Court for Milwaukee City.

State No. 179
(12-10-73)

TENNESSEE

Art Theatre Guild, Inc. v. State of Tennessee, ex rel Rhodes

Supreme Court of Tennessee
(2-19-74)

WASHINGTON

State vs. J-R Distributors, Inc.
512 P2d 1049 (July 27, 1973)

Supreme Court of Washington

B. FEDERAL "CIRCUIT COURTS"

FIRST CIRCUIT

U.S.A. vs. One Reel of Film,
481 F2d 206 (July 16, 1973)

SECOND CIRCUIT

U.S.A. v. Cangiano, et al.,
(12-27-73)

FOURTH CIRCUIT

Brown vs. U.S.A.

Petition for Writ of Certiorari
pending #73-788

FIFTH CIRCUIT

U.S.A. vs. Thevis & Peachtree News,
484 F2d 1149 (9-12-73)

Petition Pending #73-1075
#73-1091

U.S.A. vs. Cote,
485 F2d 574 (10-11-73)

Petition for Certiorari pending

SIXTH CIRCUIT

Southeastern Promotions, Ltd., vs.
Conrad, et al, 486 F2d 894 (1973)

Rehearing denied October 30, 1973

SEVENTH CIRCUIT

U.S.A. vs. Sians,
No. 71-1346 (July 5, 1973)

Appeal from the U.S.D.C. – N.D. of Illinois –
Western Div.

NINTH CIRCUIT

U.S.A. vs. Henson No. 73-2063
Opinion filed October 5, 1973

U.S. vs. Hamling, 481 F2d 307 (1973)
Rehearing denied (8-23-73)
Certiorari granted Jan. 14, 1974, 42 LW

TENTH CIRCUIT

U.S.A. vs. Friedman & Peachtree
Nat'l Distributors
488, F.2d 1141 (1973)

It is the position of Petitioner that the Commonwealth of Virginia obscenity statute was and is void for vagueness in that no criteria are set forth as would give fair notice of the precise standards of criminality before the commission of the alleged offense. *Watkins v. U.S.*, 354 U.S. 178, 208 [1957].

When dealing with a claim of void for vagueness in the penumbra of the *First Amendment*, we must be mindful of the decision of the United States Supreme Court in *U.S.A. v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963), wherein the Court stated:

> "In this connection we also note that the approach to 'vagueness' governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute 'on its face' because such vagueness may in itself deter constitutionally protected and socially desirable conduct. See Thornhill v, [State of] Alabama, 310 U.S. 88, 98, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940); N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328 [9 L.Ed.2d 405]."

To support our contention herein, we should like to briefly review the written opinions identified herein as cases (A) through (E) as will support our position.

Mr. Chief Justice Burger, in *Miller v. California, supra,* at page 4927, conceding the failure of the Court to set forth precise constitituional standards, writes in part as follows:

> "Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States[police power. See, e.g. Redrup v. New York, 386 U.S. 767, 770-771 (1967). We have seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication [footnote omitted].' Interstate Circuit, Inc. v. Dallas, supra, 390 U.S. at 704-705 (1968) (Harlan, J., concurring and dissenting)."

In a footnote 3 of the majority opinion appended to the foregoing quote, we read:

"In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. Redrup v. New York, 386 U.S. 767 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the Redrup 'policy.' See Walker v. Ohio, 398 U.S. 434, 435 (dissenting opinions) (1970). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us."

The majority opinion further points out:

"The case we now review was tried on the theory that the California Penal Code §311 approximately incorporated the three-stage Memoirs test, supra. But now the Memoirs test *has been abandoned* as unworkable by its author and *no member of the Court today supports the Memoirs formulation.*" (Emphasis supplied.)

After recognizing the failure of any constitutional definiation of what is obscene accepted by a majority of the Court, the opinion of Mr. Chief Justice Burger goes on to state the singular unvarying factor which represents a consensus of prior decisions of the Court:

"This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment, Kois v. Wisconsin, 408 U.S. 229

(1972). United States v. Reidel, 402 U.S. 351, 354 (1972). Roth v. United States, 354 U.S. 476, 485 (1957). 'The First and Fourteenth Amendments have never been treated as absolute (footnote omitted).' Breard v. Alexandria, supra, 341 U.S. 622 at 642 (1951), and case cited. See Times Film Corp. v. Chicago, 365 U.S. 43, 47-50 (1961); Joseph Burstyn, Inc. v. Wilson, supra 343 U.S. at 502 (1952)."

Thereupon the Court goes on to state what it now promulgates as a new constitutional standard for State cases (and in *U.S. v. Orito, supra,* and *U.S.A. v. 12-200 Ft. Reels of Super 8mm Film, supra* [see footnote] made potentially applicable to a federal obscenity case, after legislative enactment or authoritative judicial construction by the United States Supreme Court):

"We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc., v. Dallas, supra, 390 U.S. at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable State law as written or authoritatively construed.* A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value." (Emphasis supplied.)

The opinion of Mr. Chief Justice Burger speaking for the majority pointing to the prospective operation of the newly announced constitutional standards, after either future

legislative enactment or authoritative judicial construction (if possible) stated at page 3164:

> 'Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. See Roth v. United States, supra, 354 U.S. at 491-492 (1957)."

It is important to note the context in which the Court was called upon to define the press materials that a State could permissibly regulate, and, in *Miller v. California, supra,* the new constitutional gloss placed on obscenity-pornography cases must be considered in light of the aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive sexually explicit materials. See 413 U.S., page 18 wherein appears the following caveat:

> "This case involves the application of a State[s criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material[2] when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. Stanley v. Georgia, 394 U.S.

629, 637-643 (1968). Interstate Circuit, Inc. v. Dallas, supra, 390 U.S. at 690 (1968). Redrup v. New York, 386 U.S. 767, 769 (1967). Jacobellis v. Ohio, 378 U.S. 184, 195 (1964). See Rabe v. Washington, 405 U.S. 313, 317 (1972) (Burger, C.J. concurring); United States v. Reidel, 402 U.S. 351, 360-362 (Marshall, J., concurring) (1971); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). Breard v. Alexandria, 341 U.S. 662, 644-645 (1951); Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949); Prince v. Massachusetts, 321 U.S. 158, 169-170 (1944). Cf. Butler v. Michigan, 352 U.S. 380, 382-383 (1957); Public Utilities Comm n v. Pollak, 343 U.S. 451, 464-465 (1952). It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment."

See also footnote 2 in further explanation.

Miller v. California, supra, is the key case in which the United States Supreme Court defines the standards which now must be used to identify obscene material that a State or the federal government may regulate without infringing the *First Amendment.* It is obvious that the Court undertook to formulate standards more concrete than those that have ever been in the past. The sharpness of the break with *Roth* when the Court handed down *Memoirs v. Massachusetts,* 383 U.S. 413 (1966) was not nearly so great as the break with *Memoirs* that was handed down by the Court in *Miller v. California, supra,* as far as specifically designating prohibited material is concerned. The Court was very careful to announce that statutes designed to regulate obscene materials must be carefully limited and the Court confined the permissible scope

of obscenity regulation to works which depict or describe sexual conduct specifically defined by the applicable obscenity statute as written or as authoritatively construed.

The Court discussed the press materials to which the regulation would be confined, the press materials which would constitute the offense and the guidelines necessary to forewarn a potential wrong doer. The element of the three part test and the key guideline for the trier of fact in the new tripartite test clearly indicate the facial invalidity of the federal statute where we read:

> "(b) Whether the work depicts or describes, in a patently offensive way, sexual conduct in a patently offensive way, sexual conduct that is specifically defined by state law . . . If the state law that regulates obscene material is thus limited as written and construed, the material may be regulated."

Clearly, if the provisions of the Statute are to be limited to press materials which depict or describe hard core sexual conduct, and if that sexual conduct is specifically defined in writing by the legislature, or if specific hard core sexual conduct must be read into the statute by authoritative judicial construction, the present Statute under attack is not sufficient to regulate those works depicting and describing that conduct.

It should now be necessary for the Georgia Legislature to create legislation anew adopting, if they desire, the test suggested in *Miller* so that in the future any elaborations or constructions of the *Miller* test can be left to the courts. Before the Appellate courts can so construe, there must exist a constitutionally permissible statute with which to work. The present Georgia statute can not be authoritatively

construed to meet the *Miller* test of specificity. It was one thing for this court to suggest constitutionally permissible limits; yet, it is another to add to a statute by authoritative judicial construction "specifically defined sexual conduct" never previously mentioned or defined by the State of Georgia Supreme Court. This Court said:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.

In other words, it is one thing to "elaborate" on the *Roth* test as did the *Memoirs* court without judicially legislating. It is another to "create anew and engraft the *Miller* test" onto the present statutes. Any case, criminal or civil, pending trial or appellate review based on Pre-Miller conduct, should be set aside where there has not been given the "fair warning" suggested by this Court in *Miller*. The "fair warning" concept of a specifically defined statute prohibiting or punishing public obscenity would comport with Fifth and Sixth Amendment considerations as well as the all important First Amendment. Any case, criminal or civil pending trial or appellate review based on Pre-Miller conduct, in a jurisdiction where as, in the case at bar, there had been no authoritative judicial construction specifically defining the punitive patently offensive hard-core sexual conduct prior to the date on which the dissemination of the sexual materials occurred should be granted certiorari by this court and revised. It is clear that the present judicial construction by the Supreme courts of Georgia incorporating the *Miller* test must fail at this juncture

because the statute as written fails to give any person fair notice that criminal or civil liability is dependent upon a new Supreme Court suggested test that only legal researchers could appreciate at the point in time when the conduct occurred.

The United States Supreme Court's per curiam opinion in *Rabe v. Washington*, 405 U.S. 313 (1972) clearly indicated that the application of a statute in this manner would violate one's right to Due Process of law. Engrafting *Miller* standards into the statute as written or as might be subsequently construed by authoritative judicial construction in an effort to prevent the legislature having to take the trouble to enact a new statute, punishes one for conduct that was not criminal at the time that it is committed. Hence, such authoritative judicial construction would violate the requirement of the Due Process clause in that a criminal statute must give fair warning of the conduct which it prohibits. There is just no doubt that the constitutional requirement of definitiveness is violated by the Georgia statute because it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. No one should be held punitively responsible for conduct which he could not reasonably understand to be proscribed at the time he engaged in the conduct.

The apparent constitutionally impermissible judicial construction of the questioned Virginia statute, if this Court takes no action, will become retroactively expanded by judicial construction to the detriment of the ordinary adult in our society. Facially, the statute is void for vagueness. The man in the street looking at this statute, however, will be lulled into a false sense of security because he has no reason to suspect that conduct clearly not described in the statute

and outside of the scope of the statute as written could be retroactively brought within the statute by an act of judicial construction, depending on the judicial forum. A deprivation of the right of fair warning results from an unforeseeable and retroactive judicial expansion of vague and imprecise statutory language, which is what Georgia will seek to convince this Court that it should do.

This Court's failure to strike down the applicable statutes as being vague will permit an unforeseeable judicial enlargement of the criminal statute before it, which will be applied retoractively, and which will operate precisely like an *ex post facto* law. All those actions done before the United States Supreme Court[s announcing of new standards and which were done innocently under old standards can now become criminal acts and punishable by judicial fiat. The Congress and the States are barred by the *ex post facto* clause of the *Constitution* from passing laws of this nature and surely this Court and the various appellate and trial courts must be barred by the due process clause from achieving precisely the same results by judicial construction.

It is interesting to note that in only one case, *Kaplan v. California, supra,* did this Court affirmatively agree that the publication ("Suite 69") was obscene under the *Roth – Memoirs* formulation, which was an express part of the California Penal Code §311 (at page 118) but, notwithstanding the concurrence of the majority of the United States Supreme Court with the independent constitutional judgment of the California appellate courts on review that the said publication was obscene, and notwithstanding the further finding at page 122 which reads:

> "On the record in this case, the prosecution's evidence was sufficient, as a matter of federal constitutional law to support Petitioner's conviction."

The case was also vacated and remanded.

We suggest that the action of this Court in vacating and remanding Kaplan, was an express acknowledgement of the patent unconstitutionality of the California Penal Statute. This Court sent the matter back to the appellate court for disposition consistent with its decisions announced on June 21, 1973, including the possibility of allowing the appellate court to make, if it could, a judicial construction to be applied prospectively. It is clear that the California appellate court is being given an opportunity to establish, if it can consistent with its constitutional authority, an authoritative judicial construction of the regulating State statute which would implement the newly announced permissible constitutional standards for judging proscribable obscenity, including "hard core" sexual conduct that is specifically defined by State law. (See examples suggested by the Court on page 25.)

It is clear, then, that in the event of such a ruling, Mr. Kaplan should not be held accountable.

The Supreme Court has stated:

> "A ruling which is purely prospective does not apply even to the parties before the Court." Linkletter v. Walker, 381 U.S. 618 (1965) at page 621.

See also:

England v. Board of Medical Examiners, 375 U.S. 411;

Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358.

If the *Miller* standards are to mean anything consistent with one's constitutional rights of fair warning and notice, the Virginia Supreme Court has misconceived the case and has failed in the task assigned to it by this Court when it vacated and remanded No. 72-94.

II.

THE PUBLICATIONS INVOLVED IN THE CASE ARE NOT OBSCENE IN THE CONSTITUTIONAL SENSE AND THUS ARE PROTECTED EXPRESSION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AS THE SAME WAS APPLICABLE DURING THE PERIOD OF TIME COVERED BY THE ALLEGED CONDUCT CHARGED AGAINST PETITIONER.

The non hard-core publications involved herein are comparable to those held protected by this Court in the following case:

A. *Bloss vs. Michigan*, 402 U.S. 938 [1971]

B. *Cain vs. Kentucky*, 397 U.S. 319 [1970]

C. *Robert Arthur Management Corp. vs. Tennessee*, 389 U.S. 578 [1968]

D. *IM Amusement Corporation vs. Ohio*, 389 U.S. 573 [1968]

E. *Schackman vs. California*, 388 U.S. 454 [1967]

F. *Ratner vs. California*, 388 U.S. 442 [1967]

G. *Cobert vs. New York*, 388 U.S. 443 [1967]

This Court in *Miller vs. California*, supra, concedes that it must be the final arbitor and review each obscenity case that comes before it and cited with approval in *Miller* from *Roth* the following:

> "Our duty admits of no substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case."

Ever since the United States Supreme Court determined, in *Roth v. United States*, supra, that the *First*

Amendment did not protect obscene materials, it has necessarily assumed the responsibility of devising formulae for recognizing the "dim and uncertain", *Bantam Books v. Sullivan*, 372 U.S. 58, 60 (1963), which separates obscenity from protected expression. That the Court, in its attempts to separate obscenity from protected expression, has had its difficulties in articulating clear standards for prosecutors, courts, and citizens to follow is readily apparent from the multitude of fragmented opinions, which have emanated from the Court in lieu of clear majority decisions; *e.g.*, *Memoirs v. Massachusetts*, 383 U.S. 143 (1966); *Ginzburg v. United States*, *supra*; *Jacobellis v. Ohio*, 378 U.S. 184 (1964), and the numerous others without opinion which have characterized the Court's efforts in this sphere.

This Court on June 21, 1973, long after the time of the alleged offense, has articulated standards for the future which they suggest will pass constitutional muster in *Miller v. California* and the other cases decided on that day. The majority of this Court attempted to find a solution to the imprecision of the various standards relied upon by the members of the Court prior tothis time and set out to fashion such new standards.

The publications involved herein should be judged, if at all, by the status of the law on the standards being applied by the Courts as of the time of the conduct complained of. Briefly, the law which was being applied at that time by this Court permitted a certain type of judicial review which has been characterized as the Redrup approach, and we shall address ourselves to the status of the law as it was for the purposes of this part of our argument.

It would be time-consuming and fruitless to detail each and every case that has appeared before the Court after Roth, but it is significant to note a trend developed, which found

fruition in 1967 in the case of *Redrup v. New York, supra,*. For the first time, it became relatively clear what the Court meant when in *Roth* it made the reference to need to prevent erosion in the *First Amendment.* rights by Congress or by the State to permit intrusion or encroachment only when necessary to prevent encroachment upon more important interests, when the Court, in its *per curiam* opinion, held the materials before it could not be said to be obscene in the constitutional sense. Thereafter, the Court laid down a suggested criteria for balancing the determination of whether material could be said to be obscene with the emphasis on the manner of dissemination, rather than on the object of dissemination.

This Court, in essence, suggested that where there was no evidence of sales to minors under state statutes reflecting a specific and limited concern for juveniles, nor where there was any dissemination or attempt at dissemination in a manner calculated to intrude into the privacy of an unwilling individual who wanted to avoid confrontation with this kind of material, or where there was no evidence of the type of "pandering" which the Court had seen significant in *Ginzburg v. United States,* supra, that no obscenity confiction or suppression could follow consistent with the *First Amendment.* Thereafter, the Court has reversed some thirty-three (33) cases, representing a wide cross-section from both federal and state courts, involving both criminal and civil condemnations, and the Court, in reversing these cases, cited only as its authority *Redrup v. New York, supra.* The cases reversed are: *Austin v. Kentucky,* 386 U.S. 767 (1967); *Gent v. Arkansas,* 386 U.S. 767 (1967); *Ratner v. California,* 388 U.S. 422 (1967); *Cobert v. New York,* 388 U.S. 443 (1967); *Keney v. New York,* 388 U.S. 440 (1967); *Friedman v. New*

York, 388 U.S. 441 (1967); *Aday v. United States*, 388 U.S. 447 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Sheperd v. New York*, 388 U.S. 444 (1967); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (1967); *Books, Inc. v. United States*, 388 U.S. 449 (1967); *Mazes v. Ohio*, 388 U.S. 453 (1967); *Schackman v. California*, 388 U.S. 454 (1967); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967); *Potomac News Co. v. United States*, 389 U.S. 47 (1967); *Conner v. City of Hammond*, 389 U.S. 48 (1967); *Chance v. California*, 389 U.S. 89 (1967); *I.M. Amusement Corporation v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp. v. State of Tennessee*, 388 U.S. 578 (1968); *Felton v. City of Pensacola*, 390 U.S. 340 (1968); *Henry v. State of Louisiana*, 392 U.S. 655 (1968); *Carlos v. New York*, 396 U.S. 119 (1969); *Cain v. Kentucky*, 397 U.S. 319 (1970); *Bloss v. Dykema*, 398 U.S. 278 (1970); *Walker v. Ohio*, 398 U.S. 434 (1970); *Hoyt, et al v. State of Minnesota*, 399 U.S. 524 (1970); *Childs v. Oregon*, 401 U.S. 1006 (1971); *Bloss v. Michigan*, 402 U.S. 938 (1971); *Burgin v. South Carolina, supra, Wiener v. California, supra; Hartstein v. Missouri*, 404 U.S. 988, 30 L.Ed. 2d 539 (1971).

While *Roth* attempted to provide analytic tools for the separation of protected from unprotected expression,[11] a majority of the Court has yet to agree on a precise test for determining obscenty.[12]

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[11] But see Stewart, J., dissenting in *Ginzburg v. United States, supra:* "It is not accurate to say that the *Roth* opinion 'fashioned standards' for obscenity, because, as the Court explicitly stated, no issue was there presented as to the obscenity of the material involved (354 U.S. at 481, n. 8). And in no subsequent case has a majority of the Court been able to agree on any such 'standards'."

[12] Probably the verbal formula closest to consensus so far appeared in *Memoirs v. Massachusetts, supra:* "... three

Admitting that the *Roth* Formula "is not perfect", *Jacobellis v. Ohio, supra,* raises "difficult problems", *Ibid.*, and is afflicted with "perhaps inherent residual vagueness", *Ginzburg v. United States,* supra, the Court's decision to adhere to *Roth* – "that we should try to live with it – at least until a more satisfactory definition is evolved", *Jacobellis v. Ohio, supra,* at 200 – was an interim accommodation to the Court's inability to reach a real consensus on the subject. Subsequent experience with the problem has produced no greater unanimity. Two Justices, Black and Douglas, who dissented in *Roth,* had never accepted the principle that obscenity may be regulated without violence to the *First Amendment* (see E.g., *Ginzburg v. United States, supra* at 476 [Black, J. dissenting] and at 482 [Douglas, J., Dissenting].

A third, Justice Stewart, held the view that obscenity regulation may be constitutional only if applied to "hard-core pornography."[13] Yet a fourth, Justice Harlan, had, when on

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(Footnote 12 continued)
elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 U.S. 413, 418 (1966).

A preliminary, rather unilluminating definition of hardcore pornography, "I know it when I see it", *Jacobellis v. Ohio, supra* at 197 (Stewart, J., concurring) has been supplemented by Justice Stewart by the following description "of the kind of thing to which I have reference": "Such materials include photographs, both still and motion picture, with no pretense of artistic value, *graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism,* and sometimes involving several participants in scenes of orgy-like character . . ." *Ginzburg v. United States, supra* at 499, n. 3 (Stewart, J., dissenting). (Emphasis added.)

the bench, adopted the "hard-core pornography" test as to federal prosecutions, but had urged more latitude for conviction in state criminal cases. *Jacobellis v. Ohio, supra* at 204 (Harlan, J., dissenting). Justice Brennan, together with former Chief Justice Warren and former Justice Fortas, had adhered to the three-pronged enunciated in *Memoirs v. Massachusetts,* 383 U.S. 413, (1966), *set out in full in Ginzburg v. United States, supra* at 476 (Black, J., dissenting) and at 482 (Douglas, J., dissenting), a "not dissimilar standard" from the "hard-core pornography" test. The *per curiam* opinion in *Redrup v. New York* so equates the hard-core pornography test and the three-pronged *Memoirs* test. 386 U.S. 767, 770-771 (1967). And there are indications that three (3) of the newer justices, Chief Justice Burger, and Justice Blackmun, *Ibid.*, follow Justice Harlan's views and that Justice Marshall (see majority opinion in Marshal, J., in *Stanley v. Georgia,* 394 U.S. 557 (1969)) has adopted Justice Brennan's conception of *First Amendment* interpretation in this sphere.

Moreover, a majority of the Court has united to underscore the irrelevancy, for constitutional purposes of the claim that material is "arguably devoid of any ideological content", for "the line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all", *Stanley v. Georgia, supra,* citing with approval, *Winters v. New York,* 333 U.S. 507 (1948).

Findings of obscenity have been reversed as to press materials devoted entirely to explicitedly depicting or describing the sexual activities of its characters, including

detailed and vernacular descriptions reaching the ultimate in explicitness, of heterosexual intercourse, masturbation, beastiality, oral-genital intercourse, sado-masochism, and homosexual activity; *e.g., Memoirs v. Massachusetts,* supra, ("Fanny Hill"); *Aday v. United States, supra* ("Sex Life of a Cop", see description of book at 357 F.2d 855); *Corinth Publications v. Wesberry, supra,* ("Sin Whisper", see description of book at 146 S.E. 2d 764); *Mazes v. Ohio,* supra, ("Orgy Club"); *Hoyt v. Minnesota, supra,* ("The Way of a Man With a Maid", "Lady Susan's Cruise Lover", and three other books); and *Grove Press v. Gerstein,* 378 U.S. 577 (1964) ("Tropic of Cancer").

With respect to pictoral publication the Court has reversed findings of obscentity as to films which depict totally nude women, films which show nude or partially nude woman and men engaged in sexual gyrations, simulated intercourse, and simulated oral-genital intercourse, all emphasizing pubic and rectal areas, films showing lesbian sexual activity and heterosexual activity between men and women. Moreover, the Court has affirmed a reversal by the Ninth Circuit Court of Appeals of a finding of obscenity of a "stag film depicting a nude woman masturbating, with emphasis on the female genitalia and sexual gyrations." *Pinkus v. Pitchess,* 429 F.2d 416 (CA-9 1970), *aff'd* 400 U.S. 922 (1970), *sub. nom., Pinkus v. California.*

Thus, the only conclusion which could have been rationally extrapolated from these decisions without opinion is that any publication containing exclusively pictorial material which depicts, graphically and exclusively, nudes in

sexual poses and movement, even without presence of social importance, is constitutionally protected. Should the pictures show graphic depiction of sexual acts accompanied by substantial test material, then requisite social value as was the pre-Miller concept, is present and thus, the material would not be obscene.

The publications at bar when considered as a whole, and as judged against press materials of similar or more explicit sexual content – heretofore, determined by this Court, not to be obscene in the constitutional sense, should thus be held protected, and the decision of the Supreme Court of Virginia should be summarily reversed.

III.

THE VARIOUS UNITED STATES SUPREME COURT RULINGS ON OBSCENITY PROMULGATED ON JUNE 21 AND JUNE 25, 1973, EFFECTING A SUBSTANTIAL DECISIONAL CHANGED IN THE APPLICATION OF CONSTITUTIONAL PRINCIPLES, CANNOT BE APPLIED RETROACTIVELY TO PETITIONERS IN THE CASE AT BAR FOR CONDUCT OCCURRING PRIOR TO THOSE DECISIONS, AND, THE APPLICATION OF THE STATUTE TO SAID PETITIONERS IS VOID AS EX POST FACTO LEGISLATION BY VIRTUE OF ARTICLE I, SECTIONS 9 AND 10 OF THE UNITED STATES CONSTITUTION AND THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS.

The newly announced decisions of the Supreme Court in which reference has been made herein represented "a clear

break with the past," in the words of Mr. Justice Stewart in *Desist v. United States*, 394 U.S. 244, 248 (1969).

On June 25, 1973 in a matter coming out of the Fifth and Second Circuits, the United States Supreme Court updated and restated its concept of retrospective and prospective application of decisional law making.

In the case of *Gosa v. Mayden*, et al,413 U.S. 665, (1973), question of the application of the new constitutional concept is discussed in detail, as stated in part at page

> "Rather, the prophylactic rule there formulated 'created a protective umbrella serving to enhance' a newly recognized constitutional principle. Michigan v. Payne, ____U.S.____ (1973). (41 LW 4671). That recognition and effect are given to a theretofore unrecognized and uneffectuated constitutional principle does not, of course, automatically mandate retroactivity. In Williams v. U.S.A., 401 U.S. 646, 651 (1971) Mr. Justice White made it clear citing Linkletter v. Walker, 381 U.S. 618 (1965), that the Court has 'firmly rejected the idea that all new interpretations of the Constitution must be considered always to have been the law and that prior constructions to the contrary must always be ignored."

See the extensive discussion of this subject in the following cases:

A. *Linkletter v. Walker*, Supra;

B. *Stovall v. Denno*, 388 U.S. 293, 297 (1967);

C. *Desist v. United States*, supra;

D. *Robinson v. Neil*, 409 U.S. 505 (1973);

E. *Michigan v. Payne*, 412 U.S. 47 (1973).

See also:

"Comment: Retroactive or merely prospective operation of new rule adopted by Court in overruling precedent – federal cases." 14 LEd 2d 992.

"Prospective Overruling and Retroactive Application in the Federal Courts." 71 Yale L.J. 907 (1962).

As has been stated the United States Supreme Court on June 21 and June 25, 1973 vacated and remanded approximately sixty-eight (68) obscenity cases to the lower courts for final disposition. It is clear that the action of this Court in this regard in vacating and remanding the said sixty-eight (68) cases approximately ten (10) others have been dealt with by this Court during the October 1973 term in the same way. The rationale of *Miller v. California*, supra (see *U.S. v. 12-200 Ft. Reels of Film*, supra, n. 7) is to apply only prospectively as the language of those decisions makes clear, because there was no constitutionally valid test pertaining to obscenity agreed to by a majority of the Court that would give fair warning to a defendant that his proposed course of conduct would subject him to possible criminal prosecution, and thus said vague laws were violative of the *Fifth, Sixth and Fourteenth Amendment* rights of such defendants.

Appellate judges have dismissed indictments and/or informants against persons in Indiana as well as the States of Iowa, Louisiana, North Dakota, Tennessee, New Jersey and California on the basis that the same were brought under a law which is now lacking in specificity according to the Supreme Court decisions and thus unconstitutional as applied to the various defendants before the Court.

It is axiomatic that any criminal statute must give fair warning of the conduct that it makes a crime. *(United States v. Harriss,* 347 U.S. 612, 617.)

The Due Process clause of the *Constitution* requires that a court strike down a criminal statute where it was not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connolly v. General Construction Co.,* 269 U.S. 385, 391.

The United States Supreme Court has often recognized that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of Due Process of law, Ibid., and that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed what the State commands or forbids." *Lanzetta v. New Jersey,* 306 U.S. 451, 453.

See also:

A. *Rabe v. State of Washington,* 405 U.S. 313 (1972);

B. *Wright v. State of Georgia,* 373 U.S. 284 (1963);

C. *Palmer v. City of Euclid,* 402 U.S. 544 (1961);

D. *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972).

If the newly announced constitutional principles promulgated by the United States Supreme Court in approximately sixty-eight (68) judgments rendered on June 21 and June 25, 1973 were to be applied to Petitioner in the case at bar for alleged conduct said to be violative of the statute at a time during April 1971, it would thus be violative of the Due Process clause and *Ex Post Facto* clause of Article I, Section 9 and 10.

An *ex post facto* law has been defined by the United States Supreme Court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action," or "that *aggravates* a *crime,* or makes it *greater* that it was, when committed." *Calder v. Bull,* 3 Dall 386, 390 (Emphasis supplied).

This Court has said that "No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time." *King v. Missouri,* 107 U.S. 221, 135.

To put this question in better prospective, we should like to discuss the summary of the general principles that would

relate to indictments and/or informations charging violations of State and/or federal laws pending trial or on appeal as of June 21, 1973 for conduct purportedly engaged in prior to that time:

A. BLACKSTONE'S RETROACTIVE THEORY THAT A COURT MERELY DISCOVERS WHAT THE LAW HAS ALWAYS BEEN WAS REJECTED BY THE U.S. SUPREME COURT.

The common law theory of Blackstone was that in a new decision overruling prior decisions or putting a non-judicial gloss on a statutory interpretation the courts merely discivered what the law always was and had been, and therefore did not effect any change in the law, and thus was retroactive. The theoretical basis for this has now been rejected. *Linkletter v. Walker*, supra, at pp. 622-623 (1964); accd. *United States v. Fay*, 333 F.2d 12, 15-16 (2d Cir. 1964), with citations. In *Linkletter* the court, 381 U.S. at 623, said:

> 'Thus the accepted rule today is that in appropriate cases the court may in the interest of justice make the rule prospective."

This statement follows a five-page discussion of what the court calls the history and theory of the Blackstonian rule that "the judge rather than being the creator of the law was but its discoverer" (381 U.S. at 623) as contrasted to the Austin theory that judges do engage in intersitial lawmaking (not rewriting of statutes). In rejecting the Blackstonian theory of automatic retroactivity, the court held (381 U.S. at 627) that there was no distinction to be drawn between

criminal and civil litigation, and specifically cited the criminal income tax evasion case of *James v. United States,* 366 U.S. 213 (1961), as an example of prospective overruling in a criminal case.*

Linkletter, supra, which rejected this Blackstonian theory involves the start of the whole body of case law to determine whether expanding constitutional safeguards in favor of defendants in State criminal trials, i.e. the *Fourth, Fifth* and *Sixth Amendments,* were to be applied retroactively or prospectively. See Annotation, 22 L.Ed. 2d 824-858. The considerations in our case are quite different, but some of the principles as to when constitutional protections are to be applied retroactively may be helpful. In any event, the Blackstonian principle of automatic retroactivity has been explicitly rejected and, in addition, the decision is not retroactive on *ex post facto* and related principles.

B. LACK OF FAIR NOTICE RULE.

The basic rule is that a penal statute is void for vagueness where it is not sufficiently explicit to give fair notice and fair warning of what conduct is forbidden and proscribed. *Lanzetta v. New Jersey,* supra, at page 453 (1939); *United States, v. Harriss,* 347 U.S. 612, 617 (1954); *Rabe v. Washington,* supra, at page 316 (1972).

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*In *James* the criminal conviction for federal income tax evasion was set aside on the grounds that the taxpayer had a right to rely on the judicial gloss placed on the statute.

This principle is also applicable where the uncertainty of the statute is not clearly revealed until and except by the court's decisions. In *Bouie v. City of Columbia*, supra, at p. 352, the court said:

> "* * *If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in *Lanzetta*, or the 'guess at [the statute's] meaning and differ as to its application,' as in *Connally*, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question."

C. ANALYSIS OF THE MILLER DECISION.

Part I of the *Miller* decision traces the history of the obscenity law from *Roth*. It states that "apart from the initial formulation in the *Roth* case, no majority has at any time been able to agree on a standard," (page 22) that the *Memoirs* test was a plurality test only, and that as of June 21, 1973 even *Memoirs* had been abandoned by all members of the court.

Since under Part I of the *Miller* decision there were no standards, the court thereupon in Part II proceeded to set forth a new three-fold or tripartite test to serve as a basis for the prosecution *only when* and provided that under the second prong of the test patently offensive hard-core sexual conduct was specifically defined so as to give fair notice. The court (page 24) states it acknowledged the dangers of regulating expression, and hence, the definitions of sexual conduct which can be prohibited "must be specifically defined by applicable State law as written or authoritatively construed."

After the court set forth the new tripartite test with examples of what might be proscribed as patently offensive depcitions of sexual conduct, the court continued (page 25):

> "Under the holdings announced today, *no one will be subject to prosecution* for the sale or exposure of obscene materials *unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined* by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. * * *" (Emphasis supplied.)

On page 29 the court reiterated that it was only on June 21, 1973 that the court had agreed on concrete guidelines to isolate hard-core pornography. The Court said:

> "* * * But today, for the first time since Roth was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment. Now we may abandon the casual practice of Redrup v. New York, supra, and attempt to provide positive guidance to the federal and state courts alike." (Emphasis supplied.)

D. UNITED STATES V. 12-200 FT. REELS FOOTNOTE 7 – PROSPECTIVE APPLICATION.

In footnote 7 the court said that it was the duty of federal courts to authoritatively construe federal statutes and "we are prepared to construe such terms (i.e. obscene, lewd,

lascivious as used in the statute) as limiting regulated material to patently offensive *representations or descriptions of that specific hard core sexual conduct given as examples in Miller v. California."* (Emphasis supplied.) We pass for the moment just how the court could construe a federal statute for arrests after June 21, 1973 with this wide range of permissible definitional options without legislating and without invoking an *Erie v. Tompkins* doctrine, and turn to prospective application.

(i) The court is prepared (in the future) to construe the federal statute to limit it to depictions of "hard core sexual conduct" which were for the *first time* and as of June 21, 1973 specifically set forth in *Miller.* This is a very clear statement that as of June 21, 1973 there was no definition of patently offensive hard-core sexual conduct, which the court said *must* be present before there can be any prosecution. Criminal convictions are not predicated on noneexistent standards and nonexistent definitions.

(ii) It would appear that the judicial statement in footnote 7 of the decision in *12-200 Ft. Reels,* supra, purporting to overrule a case wholly prospectively is in fact no more than a dictum, since it is by hypothesis, inapplicable to the parties or the controversy before the court. Nevertheless, such a dictum may be significant, with respect no future transactions or evens, as an indication that further reliance on the "overruled" case is no longer justified. In fact, such a dictum can achieve virtually the same effect without even using the word "overrule" in connection with the earlier decision. That is, the court, without declaring the earlier decision overruled, can simply issue a warning that subsequent to the date of the court's opinion or some specified future

date, any reliance on the earlier decision is unwarranted. If a person subsequently attempts to rely on the earlier decision despite this warning, the court, in deciding that person's case, can conclude that reliance after the date specified in the warning was unjustified, and the court can then declare, as a holding rather than as dictum, that the earlier decision is overruled. Thus, by using a two-stage overruling process, consisting first of a warning in the form of a dictum and secondly, if necessary, of a holding overruling an earlier decision, the court can achieve a desirable effect by changing a bad rule without defeating any strong, justifiable reliance interests.

Accordingly, it is conceivable that in the context of the enforcement of the State obscenity laws, which laws can only be authoritatively construed by a state appellant Court, that what this court has done is forewarned individuals who propose to engage in the business of selling sexually explicit materials that they may no longer rely upon the more permissive standards of the *Roth-Memoirs* formulation after the date of the court's decisional change of June 21, 1973. Any defendant on appeal to the high court for conduct engaged in post-June 21, 1973 may no longer say that a judicial construction in his case would be *ex post facto* when applied to him because as of the date of his alleged offense the court had not "authoritatively construed" federal statutes because, as was made significant in *Bouie v. City of Columbia,* supra, the hypothetical defendant could have foreseen the judicial gloss that was to be placed on the statute and thus the two-stage process suggested herein would be complete by (a) the authoritative judicial construction on the state obscenity statute, and (b) the affirmation of the conviction of a defendant tried under the proposed application of that statute for post-June 21, 1973 conduct.

E. EX POST FACTO JUDICIAL LAWMAKING PROHIBITED.

As stated, punitive judgments are not predicated on nonexistent standards. At the same time, the new test and permissible definitions of legally proscribable obscenity may not be applied retroactively, which is why, incidentally, there were no affirmations of convictions by the Supreme Court in the sixty-eight (68) cases before it and vacated.

Under *Linkletter*, supra, the Blackstonian theory of automatic retroactivity was abandoned. In addition, in determining whether a new decision should be applied retroactively the Supreme Court has specifically held that unforeseen judicial enlargement of criminal statutes is prohibited as an *ex post facto* law, *Bouie v. City of Columbia*, supra, and many authorities, while not labeling it *ex post facto*, also proscribe the retroactive application of a decisional change in criminal law by a court which would work to the disadvantage of the accused.

Ex post facto laws (prohibited by Article I, Sections 9 & 10 of the Constitution) generally include a change in the statutory law which in relationship to a criminal offense alters the situation of the accused to his disadvantage. *Thompson v. Utah*, 170 U.S. 343. Both the new serious literary, etc. value test and the new optional definitions of what might be proscribed as depictions of patently offensive hard core sexual

conduct substantially alter the situation of the pre-June 21, 1973 defendant to his obvious disadvantage. In *Bouie* the court said (378 U.S. at 353):

> "Indeed, an unforseeable judicial enlargement of a criminal statute applied retroactively operates precisely like an ex post facto law such as Art. I § 10 (sic) of the Constitution forbids." (parenthesis and emphasis supplied.)

Bouie followed in *Love v. Fitzharris*, 460 F.2d 382, 385 (9th Cir. 1972), "new court decision making what was lawful when done, a crime *** prohibited by the Constitution."

While not labeled *ex post facto*, the decisions and authorities clearly prohibit a change in the criminal law by court decision which makes criminal that which was not criminal or expands the area of criminal liability by putting an interpretation on a statute which could not have been foreseen or cures a vagueness by that very decision. *James v. United States*, 336 U.S. 213, 221-222; *Shuttlesworth v. Birmingham*, 394 U.S. 147; *Bouie*, supra; *Rabe v. Washington*, supra, at p. 315; 20 Am. Jur. 2d Courts § 236; 51 Virginia Law Review 201, 254.

As previously maintained, the *James* case involved a prosecution for income tax evasion by one Mr. James who had embezzled funds but had not reported them. At the time James failed to report his income a Supreme Court decision in the Wilcox Case, *Commissioner v. Wilcox*, had held that embezzled funds did not constitute income. The Supreme Court held in *James v. United States*, supra, that the element of willfulness could not be proved in a criminal prosecution because James was entitled to rely on the statute with the

gloss placed upon it by Wilcox, and therefore the indictment had to be dismissed.

Shuttlesworth held a subsequent narrowing interpretation which can save a criminal statute cannot be applied retroactively. In *Shuttlesworth* the petitioner was convicted for failing to obtain a permit to have a parade. *Shuttlesworth* was convicted, his conviction was reversed on the grounds that the Birmingham ordinance granted too much discretion to the City of Birmingham in terms of denying parade permits. The highest court of Alabama by decision rewrote the city ordinance and after narrowly construing it, and thus saving it, thereupon reinstated *Shuttleworth's* conviction. The Supreme Court reversed. *Here pertinent,* the Supreme Court held that assuming the Alabama Supreme Court[s rewriting the ordinance was successful (394 U.S. at 155), that *Shuttlesworth* in 1963 could not have had the clairvoyance to foresee the narrowing construction which would ultimately be placed on the statute by the Alabama Supreme Court in 1967 (394 U.S. at 156).

In *Bouie,* supra, 378 U.S. at 352, the court in addition to *ex post facto* (though closely allied to it) said:

> "Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot 'be cured in a given case by a construction in that very case placing valid limits on the statute."

In *Rabe* the Supreme Court of Washington held the motion picture obscene because of the context or location of its exhibition (it was an outdoor theatre). In reversing the Supreme Court said:

> "Petitioner's conviction was thus affirmed under a statute with a meaning quite different from thy one he was charged from violation."

The court held no fair notice that criminal liability was dependent upon the place where the film was shown.

51 Virginia Law Review at 254:

> "As to judicial changes which expand the substantive criminal law the values seem to line up on the side of prospective limitation, but to be overshadowed by the principle prohibiting ex post facto criminal lawmaking, *which demands the same result in any event.*"

Accordingly, the utilization of *Miller* standards for pre-June 21, 1973 conduct is violative of Petitioner's rights and this case should be reversed.

IV.

THE UTILIZATION OF A PURELY LOCAL STANDARD AS OPPOSED TO A STATE STANDARD VIOLATES PETITIONER'S FIRST AMENDMENT AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

The Commonwealth of Virginia in a case decided the same day as the case at Bar (*Price v. Commonwealth of Virginia*, 201 S.E.2d 798) held that the Virginia definition of obscenity is that the word 'obscene' . . . "shall mean that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion, and if it goes

substantially beyond customary limits of candor in description or representation of such matters."

The Supreme Court of Virginia went on to say the following: "We have narrowed this definition by judicial construction. In *House v. Commonwealth,* 210 V. 121, 127, 169 S.E.2d 572, 577 (1969), we reversed an obscenity conviction involving a magazine which featured pictures of nude and partially clothed men and women. There we held that portrayal of nudity is not, as a matter of law, a sufficient basis for a finding that a work is obscene. See also *Upton v. Commonwealth,* 211 Va. 445, 447, 177 S.E.2d 528, 530 (1970). Thus, the Virginia obscenity law under which Price was convicted limits the class of works which might be found obscene to portrayals of sexual activity or excretion, not including mere nudity, which go beyond the customary limits of candor in representing such matters.

"We conclude that the Virginia obscenity statute, as contrued, prohibits only hard core pornography such as the examples delineated in *Miller* and does not restrict constitutionally protected speech and writing. We do not believe that the *Miller* examples were intended to preempt or standardize state obscenity statutes, for the Supreme Court emphasized that it was not the court's function to propose regulatory schemes for the states. 413 U.S. at 25. Consequently, we hold that our obscenity law is not void for overbreadth.

"We also conclude that the Virginia obscenity law is not void for vagueness. A statute regulating obscene materials is not void for vagueness if it provides "fair notice to a dealer in such materials that his public and commercial activities may

bring prosecution." * * * In *United States v. 12-200 Ft. Reels of Super 8 mm Film*, 413 U.S. 123, 130 n.7 (1973), the court left open the issue of whether the words 'obscene', 'lewd', 'lascivious', 'filthy', 'indecent', or 'immoral' raised a serious doubt concerning the vagueness of a federal obscenity statute.

"The Virginia obscenity statute, as construed, gives fair notice of the meaning of obscenity. [End Text] – Cochran, J."

The Commonwealth of Virginia has also adopted a purely local standard as apart from a state standard for judging obscenity and has stated that "(i)t would be difficult, if not impossible, for a Virginia jury to formulate a statewide standard of obscenity, for our state comprises communities with a vast diversity of life styles. Materials which do not offend the community standards of our metropolitan areas might well be regarded as obscene by the standards of some of our rural communities. Moreover, Virginia juries have traditionally relied on local rather than statewide community standards.* * *"

Thus it is clear that the Commonwealth of Virginia Supreme Court ignored the invitation from Chief Justice Burger to authoritatively construe its obscenity statute to state further the patently offensive hard-core sexual conduct specifically defined as required under *Miller*. They have also chosen to utilize a test for determining contemporary community standards less than the statewide contemporary community standard test given in *Miller v. California, supra.*

CONCLUSION

The Commonwealth of Virginia Supreme Court in its decision in *Winslow v. Commonwealth of Virginia* affirmed the Judgment below on the basis of *Price v. Commonwealth* which it includes by reference, and the points made in the last argument herein regarding the constitutional deficiencies in *Price v. Commonwealth* are appropriately applicable to the case at Bar.

Accordingly, for all the reasons set forth in the argument contained in this Petition, Petitioner respectfully prays that the Judgment of the Supreme Court of the Commonwealth of Virginia of January 14, 1974 be reversed, that the statute be held to be unconstitutional, and that the publications be held not to be obscene in a constitutional sense.

Respectfully submitted,

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APPENDIX "A"

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 17th *day of* October, 1972.

The petition of Donner Winslow for a writ of error and supersedeas to a judgment rendered by the Corporation Court of the City of Norfolk on the 13th day of March, 1972, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the affect of which is to affirm the judgment of the said corporation court.

A Copy,

Teste:

Howard G. Turner, Clerk

By:

Deputy Clerk

APPENDIX "B"

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 14th *day of* January, 1974.

Donner Winslow, Plaintiff in error.

against Record No. R-13947

Commonwealth of Virginia, Defendant in error.

From the Circuit Court of the City of Norfolk
(Formerly the Corporation Court of the City of Norfolk)

On August 3, 1973, the clerk of this court received a copy of an order entered in this case by the Supreme Court of the United States on August 2, 1973, heretofore recorded, which recited that on June 25, 1973, it had ordered that the judgment of this court entered on October 17, 1972 "be vacated, and that this cause be remanded to the Supreme Court of the Commonwealth of Virginia for further consideration in light of Miller v. California, ____U.S.____(1973); Paris Adult Theatre I v. Slaton ____U.S. ____ (1973) Kaplan v. California, ____ U.S.____ (1973); U.S. v. 12 200-ft. Reels of Super 8mm Film, ____U.S. ____ (1973); U. S. v. Orito, ____U.S. ____ (1973); Heller v. N. Y., ____ U.S. ____ (1973); Roaden v. Ky, ____ U.S. ____ (1973); and Alexander v. Virginia, ____ U.S.____ (1973)."

Upon mature consideration whereof, and the court having reconsider its decision in this case in light of Miller v. California; Paris Adult Threatre I v. Slaton; Kaplan v. California; U. S. v. 12 200-ft. Reels of Super 8mm Film; U. S. v. Orito; Heller v. N. Y.; Roaden v. Ky.; and Alexa v. Virginia, is of opinion to adhere to its ruling rendered herein on October 17, 1972, affirming the judgment rendered by the Circuit Court of the City of Norfolk on March 13, 1972, and it is so ordered. See Price v. Commonwealth, 214 Va. ____, this day decided.

Which is ordered to be forthwith certified to the said circuit court.

A Copy,

Teste:

Clerk

APPENDIX "C"

FIRST, FIFTH, AND FOURTEENTH AMENDMENT, U.S.C. and Section 18.1–228, Code of Virginia of 1950, As Amended

FIRST AMENDMENT CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 18.1 – 228, Code of Virginia of 1950,as amended:

Production, Publication, Sale, Possession, etc. of obscene items. Every person who knowingly:

1. Prepares any obscene items for the purposes of sale or commercial distribution;

2. Prints, copies, manufactures, produces or reproduces any obscene item for purposes of sale or commercial distribution;

3. Publishes, sells, rents, lends, transports in intra-state commerce or commerically distributes or exhibits any obscene item or offers to do any of these things;

4. Has in his possession with intent to sell, rent, lend, transport or commercially distribute any obscene item, shall be guilty of a misdemeanor [1960, c. 233.]